OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 04-004

CONSTITUTION:
Government Salary
Withholding Act

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The Honorable Miguel del Valle
Assistant Majority Leader
Illinois State Senate
327 Capitol Building
Springfield, Illinois 62706

Dear Senator del Valle:

I have your letter wherein you inquire whether, under section 5 of the Government Salary Withholding Act (50 ILCS 125/5 (West 2002)), a local governmental agency is required to permit employee payroll deductions to benefit any qualified organization, if it permits such deductions for the United Fund. For the reasons hereinafter stated, it is my opinion that, although a local governmental agency possesses the discretion to determine whether to allow payroll deductions for charitable organizations in the first instance, if deductions are authorized, then such deductions must be permitted in favor of all qualified organizations, and not limited to the United Fund.

Section 5 of the Government Salary Withholding Act provides:

> *Any local governmental agency*, unless otherwise provided in any statute specifically creating or governing any such agency, *may provide* by ordinance or resolution *for the deduction*, upon the written request of the employee, from each regular payroll period *from the compensation of such employee* the amount specified in such authorization for *payment to the United Fund and to the other organizations found qualified by the State Comptroller pursuant to the Voluntary Payroll Deductions Act of 1983*. The term "United Fund" means the same as that term is defined in Section 3 of the Voluntary Payroll Deductions Act of 1983, as now or hereafter amended. (Emphasis and underscore added.)

The phrase "local governmental agency" includes the State's units of local government and school districts. 50 ILCS 125/1 (West 2002). The term "United Fund" is defined to refer to "the organization conducting the single, annual, consolidated effort to secure funds for distribution to agencies engaged in charitable and public health, welfare and services purposes, which is commonly known as the United Fund, or the organization which serves in place of the United Fund organization in communities where an organization known as the United Fund is not organized." 5 ILCS 340/3(c) (West 2002). In most Illinois communities, the United Fund organization is the United Way.

The materials that you have provided indicate that certain charitable organizations, which have been designated as "qualified organizations" by the State Comptroller in accordance with the provisions of the Voluntary Payroll Deductions Act of 1983 (5 ILCS 340/1 *et seq*. (West 2002)), have not been included in the payroll deduction programs authorized by many units of local government and school districts. Such units of local government and

school districts generally limit deductions to those benefitting the United Way, citing the cost or complexity of handling payroll deductions for multiple charitable organizations and the discretion they have been granted by the language of section 5 of the Act. In response, the qualified charitable organizations argue that their exclusion from the payroll deduction programs amounts to a violation of their constitutional right to free speech and to equal protection of the laws. Against this background, you have inquired whether local governmental agencies may properly restrict their charitable payroll deduction programs to only the United Way.

In *Black United Fund of New Jersey, Inc. v. Kean*, 593 F. Supp. 1567 (D.N.J. 1984), *reversed on grounds of mootness*, 763 F.2d 156 (3d Cir. 1985), the court was asked to determine whether a New Jersey statute authorizing the solicitation of payroll contributions from State employees for certain charitable organizations, which in application resulted in only the United Way qualifying for this government benefit, was unconstitutional under the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment. In reaching its conclusion that the plaintiff's free speech rights had been infringed upon and that it was a violation of the plaintiff charity's right to equal protection to exclude it from access to the annual payroll deduction campaign, the district court held that the solicitation of charitable contributions and the conduct of a payroll deduction program for public employees and the accompanying information campaign all constitute an exercise of First Amendment rights. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826 (1979). Given the First Amendment interests, the court noted that any regulation of the practice

of soliciting payroll deduction contributions was subject to constitutional scrutiny. At a minimum, therefore, the restrictions on access to government offices and payrolls must be reasonable. Moreover, the court stated that the presumptive favoring of one charity over all others requires a rational basis. In light of these conclusions, the New Jersey legislature elected to repeal its statute that permitted voluntary contributions only to the United Way and replace it with an act that substantially enlarged the criteria for participation by charitable groups in the campaigning and withholding procedures. *See Black United Fund of New Jersey, Inc. v. Kean*, 763 F.2d 156 (3d Cir. 1985).

Similarly, in *Pilsen Neighbors Community Council v. Burris*, 672 F. Supp. 295 (N.D. Ill. 1987), *affirmed*, 960 F.2d 676 (7th Cir. 1992), the court was asked to review on First Amendment and equal protection grounds the constitutionality of the Illinois Voluntary Payroll Deductions Act of 1983, an Act that allows the United Fund to raise funds through the solicitation of State employees and that provides alternative provisions for other "qualified organizations" to participate concurrently in the solicitation of State employees. With respect to the First Amendment challenge, the district court determined that the State had created a non-public forum under the Voluntary Payroll Deductions Act; thus, the restrictions imposed by the Act must be reasonable and viewpoint neutral. Likewise, under the equal protection clause, the district court held that the standards established by the Voluntary Payroll Deductions Act must be viewpoint neutral, and any distinction drawn between the United Fund and other charities must be reasonably related to legitimate State interests. On appeal, the Seventh Circuit affirmed.

Citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 105 S. Ct. 3439 (1985), the court held that the State can control access to a State employee fund drive so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Thus, the court concluded that the restrictions in the Voluntary Payroll Deductions Act, whereby solicitation is permitted both for the United Fund and for other charities which obtain signatures of 4,000 employees, are both reasonable and viewpoint neutral and satisfy the constitutional requirements.

Subsequent to the decisions in the foregoing cases, the Illinois General Assembly amended the Government Salary Withholding Act to provide for the inclusion of other qualifying charitable organizations, in addition to the United Fund, in local governmental payroll deduction programs. *See* Public Act 85-1370, effective January 1, 1989. It may be presumed that in adopting a statutory amendment, the General Assembly is aware of the judicial decisions concerning prior and existing law and legislation (*Kozak v. Retirement Board of the Firemen's Annuity & Benefit Fund*, 95 Ill. 2d 211, 218 (1983); *Fraser v. Universities Research Ass'n, Inc.*, 301 Ill. App. 3d 511, 518 (1998), *aff'd*, 188 Ill 2d 444 (1999)) and that an amendment is intended to change the law as it formerly existed. *Saltiel v. Olsen*, 77 Ill. 2d 23, 29 (1979); *Cook County Sheriff's Enforcement Ass'n v. County of Cook*, 323 Ill. App. 3d 853, 858 (2001). It appears, therefore, that the General Assembly amended the Government Salary Withholding Act to ensure the constitutionality of the local governmental agency charitable payroll deduction program.

It has been suggested that the term "may" in section 5 of the Government Salary Withholding Act vests local governmental agencies with the discretion to decide whether to allow payroll deductions for the benefit of the United Fund, other qualified organizations, or both. I disagree with this construction. A review of the history of the language of section 5 indicates that the term "may" was included at the time of the section's original enactment, when deductions could be made only to benefit the United Fund. *See* Ill. Rev. Stat. 1965, ch. 102, par. 35.5. It is clear, therefore, that the term "may" relates to the determination by a local governmental agency whether to undertake a payroll deduction program whatsoever.

Although the choice to authorize a payroll deduction program is left to the local governmental agency's discretion, if a local governmental agency chooses to institute such a program, then it must adopt an ordinance or resolution permitting payroll deductions and "payment[s] to the United Fund *and* to other organizations found qualified by the State Comptroller pursuant to the Voluntary Payroll Deductions Act of 1983." That is, if any such payroll deductions are authorized by a unit of local government or a school district, then such deductions must be permitted in favor of all qualified organizations. This construction of the statutory language is consistent with the Federal case law which immediately preceded the amendment that added the language in question.

Consequently, it is my opinion that, pursuant to section 5 of the Government Salary Withholding Act, if a local governmental agency authorizes the creation of a payroll

deduction program to benefit charitable organizations, it must provide for such deductions in favor of all qualified organizations, as determined by the State Comptroller.

Very truly yours,

LISA MADIGAN
ATTORNEY GENERAL